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14
15 UNITED STATES DISTRICT COURT
16 NORTHERN DISTRICT OF CALIFORNIA
17 SAN FRANCISCO DIVISION

18 FEDERAL TRADE COMMISSION,
19

20 Plaintiff,

21 v.

22 MICROSOFT CORP.,
and
23 ACTIVISION BLIZZARD, INC.

24 Defendants.
25
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27
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CASE NO. 3:23-cv-02880-JSC

**DEFENDANT ACTIVISION BLIZZARD,
INC.'S STATEMENT IN RESPONSE TO
DEFENDANT MICROSOFT CORP.'S
ADMINISTRATIVE MOTION TO
CONSIDER WHETHER ANOTHER
PARTY'S MATERIAL SHOULD BE
SEALED (Civil L.R. 79-5(f)) [ECF NO. 288]**

Judge: Honorable Jacqueline S. Corley

I. INTRODUCTION

Pursuant to Civil Local Rules 7-11 and 79-5(f)(3), Activision Blizzard, Inc. (“Activision”) respectfully requests that the Court maintain under seal its confidential information identified below, which was provisionally filed under seal pursuant to Microsoft Corp.’s (hereinafter “Microsoft”) Administrative Motion to Consider Whether Another Party’s Materials Should Be Sealed (the “Administrative Motion”) (ECF No. 288). For the reasons described below and in the Declaration of Page Robinson (the “Robinson Decl.”) attached hereto, Activision respectfully requests that the Court consider this submission, which narrows the information that would be maintained under seal within Defendant Microsoft Corp.’s Answers and Defenses (ECF No. 260) (“Microsoft’s Answer.”)

The proposed sealing in the chart below reflects Activision’s good-faith efforts to narrowly seek sealing of only that information which is competitively sensitive and contained in internal documents, the public disclosure of which would cause injury to Activision that cannot be avoided through any less restrictive alternative means.

Document	Portions to Be Filed Under Seal	Designating Party	Basis for Sealing Request
Microsoft’s Answer	Page 7, Portion of Line 11	Activision	This paragraph contains non-public and highly sensitive information including, but not limited to, information reflecting confidential internal business data, which could be used to injure Activision if made publicly available.
Microsoft’s Answer	Page 30, Portions of Lines 8-9	Activision	This paragraph contains non-public and highly sensitive information including, but not limited to, information reflecting confidential internal business data,

Document	Portions to Be Filed Under Seal	Designating Party	Basis for Sealing Request
			which could be used to injure Activision if made publicly available.
Microsoft's Answer	Page 30, Portions of Lines 11-13 ¹	Activision	This paragraph contains non-public and highly sensitive information including, but not limited to, information reflecting strategic evaluation of forward-looking opportunities and business partnerships and negotiations, which could be used to injure Activision if made publicly available.
Microsoft's Answer	Page 30, Portion of Line 16	Activision	This paragraph contains non-public and highly sensitive information including, but not limited to, information reflecting strategic evaluation of forward-looking opportunities and business partnerships and negotiations, which could be used to injure Activision if made publicly available.

¹ Activision proposes to limit the redaction to only seal the name of the third party and the name of the third-party's service.

Document	Portions to Be Filed Under Seal	Designating Party	Basis for Sealing Request
Microsoft's Answer	Page 48, Portion of Line 15 ²	Activision	This paragraph contains non-public and highly sensitive information including, but not limited to, information reflecting terms of existing confidential agreements and business partnerships and negotiations, which could be used to injure Activision if made publicly available.
Microsoft's Answer	Page 48, Portions of Lines 20-22	Activision	This paragraph contains non-public and highly sensitive information including, but not limited to, information reflecting terms of existing confidential agreements and business partnerships and negotiations, which could be used to injure Activision if made publicly available.
Microsoft's Answer	Page 51, Portions of Lines 23-26	Activision	This paragraph contains non-public and highly sensitive information including, but not limited to, information reflecting strategic evaluation of forward-looking opportunities, assessment of the competitive landscape,

² Activision proposes to limit the redaction to only seal the specific numerals in this sentence.

Document	Portions to Be Filed Under Seal	Designating Party	Basis for Sealing Request
			business partnerships and negotiations, internal business strategy, and confidential business data, which could be used to injure Activision if made publicly available.
Microsoft's Answer	Page 52, Portion of Line 2	Activision	This paragraph contains non-public and highly sensitive information including, but not limited to, information reflecting strategic evaluation of forward-looking opportunities and business partnerships and negotiations, which could be used to injure Activision if made publicly available.

ARGUMENT

I. Sealing Activision's Confidential Business Information Contained in Microsoft's Answer Is Warranted Under Ninth Circuit Precedent

In the Ninth Circuit, “[p]arties seeking to seal judicial records relating to motions that are ‘more than tangentially related to the underlying cause of action,’ bear the burden of overcoming the presumption with ‘compelling reasons supported by specific factual findings that outweigh the general history of access and the public policies favoring disclosure.’” *Lenovo (United States) Inc. v. ICom GmbH & Co., KG*, 2022 WL 2313948, at *1 (N.D. Cal. Jun. 28, 2022); *see also Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006) (“[T]he court must ‘conscientiously [] balance the competing interests’ of the public and the party who seeks to keep

certain judicial records secret.”). Courts in this Circuit regularly find that sealing is warranted where the records or information that are sought to be sealed could be used “as sources of business information that might harm a litigant’s competitive standing.” *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 598 (1978); *see also In re Elec. Arts, Inc.*, 298 F. App’x 568, 569 (9th Cir. 2008) (same); *Velasco v. Chrysler Grp. LLC*, No. CV 13-08080 DDP (VBK), 2017 WL 445241, at *2 (C.D. Cal. Jan. 30, 2017) (stating that “district courts in this Circuit have sealed records containing ‘information about proprietary business operations, a company’s business mode or agreements with clients,’ [and] ‘internal policies and strategies’”) (internal citations omitted).

“The Ninth Circuit has explained that ‘in general, compelling reasons sufficient to outweigh the public’s interest in disclosure and justify sealing court records exist when such court files might have become a vehicle for improper purposes, such as the use of records to . . . release trade secrets.’” *Velasco*, 2017 WL 445241, at *2 (quoting *Elec. Arts*, 298 F. App’x at 569); *see also Elec. Arts*, 298 F. App’x at 569 (“A ‘trade secret may consist of any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.’”) (citation omitted). A court has “broad latitude” to grant protective orders to prevent disclosure of “many types of information, including, but not limited to, trade secrets or other confidential research, development, or commercial information.” *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1211 (9th Cir. 2002).

In determining whether a document should be filed under seal, courts consider, among other things, the measures taken to guard the information’s secrecy and the value of the information to the business or its competitors. *E.g., Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1212 (9th Cir. 2002). Here, Activision seeks to seal narrowly tailored excerpts of Microsoft’s Answer which reference and reflect, among other things, confidential, proprietary information relating to Activision’s internal decision-making processes, strategic evaluation of forward-looking opportunities, business partnerships, and internal business strategy and data. The disclosure of this information could be used to injure Activision if made publicly available.

1 **II. Sealing Microsoft’s Answer Is Necessary to Protect Activision’s Confidential and**
 2 **Proprietary Business Information**

3 Activision seeks to maintain under seal limited portions of Microsoft’s Answer, as they
 4 contain Activision’s non-public and highly sensitive information from documents obtained during
 5 the course of the FTC’s investigation and during litigation discovery. Robinson Decl. ¶¶ 4–6.
 6 Examples of such confidential information include, but are not limited to, information reflecting
 7 Activision’s confidential, proprietary information relating to Activision’s internal decision-making
 8 processes, strategic evaluation of forward-looking opportunities, business partnerships and
 9 negotiations, and internal business strategy and data. *Id.* ¶ 4. Activision takes robust measures to
 10 maintain the confidentiality of all the above-described information and does not disclose it
 11 publicly. *Id.* ¶ 6. Disclosure of this information would provide Activision’s competitors with
 12 private information about Activision’s performance and internal business strategy, which could
 13 harm Activision’s competitive standing. *Id.* ¶ 5; *see Cont’l Auto. Sys. v. Avanci, LLC*, No. 19-cv-
 14 02520-LHK, 2019 WL 6612012, at *4 (N.D. Cal. Dec. 5, 2019). Thus, the unsealing of this highly
 15 confidential and sensitive information would cause injury to Activision that cannot be avoided
 16 through less restrictive alternatives. *See* Robinson Decl. ¶ 5.

17 Finally, Activision provided the FTC with the confidential business information cited in
 18 Microsoft’s Answer pursuant to the statutory and regulatory guarantees of confidentiality contained
 19 in the Hart-Scott-Rodino Act or the FTC Act. *Id.* ¶ 6; *see also* 15 U.S.C. §§ 18a(h), 46(f), 57b-
 20 2(b), 57b-2(c); 6 C.F.R. § 4.10(d)-(g). In similar cases, the FTC has acknowledged the need to
 21 maintain the confidentiality of a party’s confidential business information that has been provided to
 22 the FTC via a regulatory request. *See, e.g., FTC v. Lockheed Martin Corp.*, 2022 WL 1446650, at
 23 *2 (D.D.C. Jan. 25, 2022) (“According to the FTC, sealing the complaint is appropriate . . . because
 24 the filing includes confidential information submitted . . . pursuant to ‘statutory and regulatory
 25 guarantees of confidentiality.’ . . . The requested sealing covers only confidential information and
 26 is, according to the FTC, required by regulation.”).

1 **III. Conclusion**

2 As stated above, compelling reasons justify sealing Activision's confidential business
 3 information contained within Microsoft's Answer, and Activision respectfully requests that this
 4 Court grant the FTC's Administrative Motion to Consider Whether Another Party's Material
 5 Should Be Sealed (ECF No. 288), consistent with the specific recitations stated herein. In
 6 accordance with Civil Local Rule 7-11, Activision has also filed a Proposed Order herewith.

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 8 DATED: July 10, 2023

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